

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
LOC NGOC PHAM,	:	
	:	
	:	BANKRUPTCY CASE
	:	NO. 04-80207-MGD
Debtor.	:	
_____	:	
	:	
LOC NGOC PHAM,	:	
	:	
	:	ADVERSARY CASE
	:	NO. 04-06677
Plaintiff,	:	
v.	:	
	:	IN PROCEEDINGS UNDER
GEORGIA DEPARTMENT OF	:	CHAPTER 7 OF THE
REVENUE,	:	BANKRUPTCY CODE
	:	
Defendant.	:	

**ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding is before the Court on the Georgia Department of Revenue’s (“Defendant”) Motion for Summary Judgment. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(I), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 (b)(1) and 28 U.S.C. § 1334. For the reasons set forth below, Defendant’s motion for summary judgment is **GRANTED**.

On December 28, 2004, Loc Ngoc Pham (“Debtor” or “Plaintiff”) commenced this adversary proceeding by filing a complaint to determine the dischargeability of a debt owed to the Defendant. Specifically, Debtor contends that Defendant asserts a claim for tax years 1995, 1996, and 1997, and that pursuant to 11 U.S.C. § 523(a)(1) the taxes owed for those

years are dischargeable.¹ Defendant filed its answer on January 7, 2005, and on January 28, 2005 filed the Motion for Summary Judgment which is currently before the Court. Defendant argues that Debtor's 1996 and 1997 state income tax liability is not dischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(i), because Debtor did not file an amended state return after the United States Internal Revenue Service reassessed upwards Debtor's income for the relevant tax years. Debtor has not filed a response to the motion for summary judgment and as a result, the motion is therefore deemed to be unopposed.

Pursuant to Bankruptcy Local Rule 7056-1(b)(2), Debtor's failure to specifically respond to Defendant's statement of undisputed material facts results in their admission. *Also see Ellenberg v. Bouldin (In re Bouldin)*, 196 B.R. 202 (Bankr. N.D. Ga 1996)(Murphy, J.). As a result, the Court finds the following to be the undisputed facts of the case: Debtor filed original Georgia income tax returns for 1996 and 1997. (Defendant's Statement of Material Facts, ¶ 1). After the filing of Debtor's original 1996 and 1997 Georgia income tax returns, the Internal Revenue Service revised the Debtor's federal income tax liabilities for 1996 and 1997 upwards. (*Id.*, ¶ 2). After the Internal Revenue Service revised Debtor's 1996 and 1997 federal income tax liabilities, the Debtor did not file amended Georgia income tax returns. (*Id.*, ¶ 3).

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences

¹ Defendant, in its Motion for Summary Judgment, acknowledges that Debtor does not have an outstanding tax liability for 1995.

therefrom in a light most favorable to the non-moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). “The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts.” *Hairston v. Gainesville Sun Publ’g. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh’g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

Section 523(a)(1) of the Bankruptcy Code provides:

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a) 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or custom duty –

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required –

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Defendant acknowledges that Debtor filed his original 1996 and 1997 Georgia income tax returns, but that due to the fact that the Internal Revenue Service subsequently changed the

amount of Debtor's income, he was therefore obligated under state law to file amended returns. Debtor's failure to file amended returns renders the taxes owed to be deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(i).

O.C.G.A. § 48-7-82(e)(1) provides, in pertinent part:

(e)(1) When a taxpayer's amount of net income for any year under this chapter as returned to the United States Department of the Treasury is changed or corrected by the commissioner of internal revenue or other officer of the United States of competent authority, the taxpayer, within 180 days after final determination of the changed or corrected net income, shall make a return to the commissioner of the changed or corrected income....

The statute clearly provides that an amended return is required. *See Jones v. Georgia Dep't. of Revenue (In re Jones)*, 158 B.R. 535 (Bankr. N.D. Ga. 1993)(Bihary, J.). The facts are undisputed that the Internal Revenue Service revised Debtor's income upwards subsequent to his originally filed 1996 and 1997 state tax returns, and that Debtor never filed amended returns. As a result, the amounts owed to Defendant during those tax years are deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(i). The Court concludes that summary judgment in favor of Defendant is appropriate. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**. The Plaintiff's Georgia income tax liabilities for 1996 and 1997 are excepted from chapter 7 discharge. A separate judgment will be entered contemporaneously with this Order.

The Clerk is directed to serve a copy of this Order upon all parties listed on the attached distribution list.

IT IS SO ORDERED.

At Atlanta, Georgia, this the 1st day of March, 2005.

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

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